

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 20, 2009 appellant, then a 47-year-old dental assistant, filed an occupational disease claim for an emotional condition alleging that the employing establishment did not follow her restrictions when she returned to work after a work injury. She alleged that she was constantly in arguments, disputes, and confrontations over tasks and duties, and violations of her medical restrictions. Appellant indicated that she filed memos and complaints about the employing establishment ignoring her restrictions. She alleged that she suffered a new emotional injury and aggravation of her previous military-related injury and she suffered from depression, acute anxiety, and post-traumatic stress disorder (PTSD). The employing establishment noted that appellant wanted to file a claim for a new emotional condition and aggravation of a prior military-related injury. It controverted the claim and indicated that she was removed from federal service on March 16, 2007 and was approved for disability retirement on October 17, 2007.

In a report dated June 24, 2009, Dr. Glenn Bricken, a clinical psychologist, noted seeing appellant to assess her emotional state secondary to a low back injury and an emotional injury sustained on August 17, 2005. His diagnoses included psychiatric factors associated with diseases, chronic pain syndrome, reactive depression, and unspecified anxiety state. Dr. Bricken opined that due to the severity of appellant's work-related psychological concerns she was unable to return to work in any capacity due to her severe psychological condition caused by her physical injury and job-related stress.

On November 23, 2009 OWCP accepted the claim for psychogenic pain. On December 9, 2009 it accepted a claim for psychogenic factors with conditions classified elsewhere, dysthymic disorder, unspecified anxiety state, other specified transient mental disorder, and mood disorder.

On December 18, 2009 OWCP rescinded December 9, 2009 acceptance of appellant's claim. It noted that the employing establishment was not given an opportunity to comment on appellant's statements and that OWCP had not obtained appellant's occupational history before accepting the claim. OWCP advised appellant that her claim was placed back into the development stage and that a final decision would be issued. In a telephone memorandum dated January 8, 2010, counsel indicated that he did not receive a copy of the rescission letter. OWCP indicated that it was resending it. The December 18, 2009 rescission letter was sent to his address of record and was not returned as undeliverable.

After further developing the claim, OWCP denied appellant's claim for an emotional condition on April 5, 2010. It found that she had not established a compensable factor of employment.

On April 9, 2010 appellant requested a review of the written record. On May 12, 2010 OWCP requested that the employing establishment provide comments on appellant's request for an examination of the written record.² It received additional evidence which included statements

² The employing establishment did not submit comments in response to this.

from two witnesses, who confirmed that they observed appellant work outside her restrictions by pushing a cart full of water pitchers and pushing patients in a wheelchair.

In a July 12, 2010 decision, an OWCP hearing representative affirmed the April 5, 2010 decision.³

Appellant submitted an April 6, 2012 report from Dr. Ronnie D. Shade, a Board-certified orthopedic surgeon, who stated that she first injured her back in 1988 while in the army and later reinjured it while working for the employing establishment. Dr. Shade noted findings and diagnosed chronic lumbosacral strain, lumbar radiculitis, chronic thoracic strain, and depression.

On September 10, 2014 counsel requested reconsideration of OWCP's December 18, 2009 decision. He argued that it erroneously rescinded acceptance of the claim. Counsel argued that OWCP rescinded the claim without providing a clear explanation of its rationale for rescission, and referred to *Deborah S. Stein*, 56 ECAB 494 (2005), to support that OWCP did not meet its burden of proof to rescind the claim.⁴ He was referred to the prior OWCP decisions dated December 18, 2009, April 5 and July 10, 2010, and argued that those decisions did not provide clear evidence that appellant's allegations were not true, or that the information provided by the employing establishment was true. Counsel explained that OWCP initially accepted the claim for psychogenic pain on November 23, 2009 and on December 9, 2009 OWCP expanded the claim. Thereafter, OWCP "without any information, evidence or supporting evidence, statements or contacted facts" rescinded the claim "because they had not received any information from the [employing establishment]." Counsel argued that five months later on May 12, 2010, the employing establishment was allowed "another 20 days" to submit comments concerning the pending review. However, no comments were submitted. Counsel also argued that the employing establishment did not further controvert the claim. He suggested that OWCP engaged in a "conspiracy, set up and bias that FECA should not desire." Counsel noted that appellant provided statements and events of emotional trauma that were directly related to her prior August 17, 2005 injury. He argued that she worked outside of her restrictions and this was supported by the two witnesses. Counsel also indicated that Dr. Bricken also attributed the injury to her injury of August 17, 2005 in his report dated June 24, 2009.

Counsel further argued that OWCP's July 12, 2010 decision was erroneous because it stated that "as of August 25, 2006 she developed depression, acute anxiety, and PTSD as well as an aggravation of a previous military service[-]related injury." However, he argued that appellant had to file an "occupational disease claim for a "consequential" emotional condition secondary to her accepted August 17, 2005 injury. Counsel asserted that employment factors and work restrictions were issues since the injury of August 17, 2005.⁵ He argued that the hearing representative "misconstrued the entire claim" and never really provided any clear

³ On July 12, 2011 appellant filed an appeal from the July 12, 2010 OWCP decision. On May 9, 2012 the Board issued an order dismissing appeal as the appeal was untimely filed. Docket No. 11-1683 (issued May 9, 2012).

⁴ In *Stein*, the Board reversed a December 8, 2003 decision of OWCP rescinding acceptance of a claim, as it did not meet its burden of proof to establish that the November 14, 1999 incident did not occur as alleged.

⁵ The claim for the alleged 2005 injury is not presently before the Board. In his July 12, 2010 decision, the hearing representative indicated that this claim was denied by OWCP on October 19, 2007.

evidence that the original acceptance was in error.” Additionally, counsel argued that the restrictions in place from her 2005 injury were repeatedly violated. He noted that the employing establishment was unable to force appellant to work outside of her restrictions, they could not find or provide any light duty that met the prescribed restrictions, and appellant was terminated. Counsel argued that appellant now had emotional and physical restrictions. He also referred to consequential conditions and argued that they arose out of her employment and submitted arguments about her restrictions. Counsel also suggested that appellant’s previous representative did not receive a letter as a suite number was not on the envelope.⁶ He argued that it was returned back to OWCP with an “insufficient address,” but never followed up upon. Counsel reiterated that OWCP did not meet its burden to rescind acceptance of appellant’s claim.

In an October 20, 2014 decision, OWCP denied appellant’s request for reconsideration as it was untimely filed and failed to present clear evidence of error. With regard to correspondence sent to appellant’s representatives, it indicated that a review of the case record revealed that no letter was returned as undeliverable.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁷ This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be filed within one year of the date of OWCP’s decision for which review is sought.⁸ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁹

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant’s application for review is untimely filed, it must nevertheless undertake a limited review to determine whether it establishes clear evidence of error. If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.¹⁰

To establish clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP,¹¹ is positive, precise, and explicit, and manifests on its face that OWCP committed an error.¹² The evidence must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must also shift the

⁶ It is unclear what letter the representative refers to.

⁷ See 5 U.S.C. § 8128(a); *Y.S.*, Docket No. 08-440 (issued March 16, 2009).

⁸ 20 C.F.R. § 10.607(a). See also *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *W.G.*, Docket No. 08-2340 (issued June 22, 2009).

⁹ *E.R.*, Docket No. 09-599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁰ *M.L.*, Docket No. 09-956 (issued April 15, 2010). See also 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (October 2011) (“the term ‘clear evidence of error’ is intended to represent a difficult standard”).

¹¹ *Dean D. Beets*, 43 ECAB 1153 (1992).

¹² *Leona N. Travis*, 43 ECAB 227 (1991).

weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision for which review is sought. Evidence that does not raise a substantial question is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. A determination of whether the claimant has established clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.¹³

ANALYSIS

In its October 20, 2014 decision, OWCP properly determined that appellant failed to file a timely application for review. Appellant seeks review of its December 18, 2009 decision which rescinded the acceptance of her claim. OWCP rendered its last merit decision in this case on July 10, 2010, which affirmed a previous denial of the claim. As the September 10, 2014 request for reconsideration was submitted more than one year after the most recent merit decision, it was untimely filed.

The Board finds that appellant's untimely request failed to demonstrate clear evidence of error. In its December 18, 2009 decision, OWCP rescinded acceptance of her claim for an emotional condition. Thereafter, on September 10, 2014 counsel requested reconsideration. The Board finds that the arguments submitted by him do not raise a substantial question as to the correctness of OWCP's decision and they are insufficient to demonstrate clear evidence of error on the part of OWCP in rescinding acceptance of her claim on December 18, 2009.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁴ In his September 10, 2014 letter, counsel argued that OWCP erroneously rescinded the accepted claim and entitlement to benefits without providing a clear explanation of its rationale for rescission and referred to the precedent within the matter of *Deborah S. Stein*.¹⁵ However, his argument does not establish clear evidence of error. Unlike *Stein*, where OWCP improperly sought to place the burden of proof on appellant and did not otherwise show a sufficient basis for a rescission, it explained the basis of its rescission in the December 18, 2009 decision. OWCP indicated that it prematurely accepted the claim as the employing establishment was not given an opportunity to comment on appellant's statements and also because OWCP had not obtained appellant's occupational history before accepting the claim.¹⁶ This was particularly important where the employing establishment had initially controverted the claim. Thus, appellant's argument that OWCP did not provide a clear explanation for the rescission is insufficient to establish clear evidence of error.

¹³ *J.S.*, Docket No. 10-385 (issued September 15, 2010); *B.W.*, Docket No. 10-323 (issued September 2, 2010).

¹⁴ *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

¹⁵ 56 ECAB 494 (2005).

¹⁶ OWCP's procedures direct it to request evidence needed to properly develop the claim. See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.4, 7 (June 2011).

Counsel referred to the prior OWCP decisions dated April 5 and July 10, 2010, and argued that neither decision provided clear evidence that the allegations alleged by appellant were untrue, or that the information provided by the employing establishment was true. He also argued that the employing establishment was allowed another opportunity to submit written comments regarding the review of the written record, but that it submitted no comments and did not further controvert the claim. Counsel argued that this supported there was no rationale or supporting facts to rescind the accepted claim. These contentions are insufficient to establish clear evidence of error. The April 5 and July 20, 2010 decisions pertained to whether appellant had established an emotional condition claim. OWCP did not purport to adjudicate the prior rescission in the April 5 and July 20, 2010 decisions. Counsel also has not submitted evidence to support allegations of improper claim development. These assertions do not show clear evidence of error.

Furthermore, counsel made contentions regarding appellant's prior claim, including her work restrictions, and appellant's dissatisfaction with OWCP's development of the prior claim. These assertions about a prior claim, which is not before the Board, are insufficient to establish clear evidence of error in the present matter. These contentions about a prior claim do not raise a substantial question as to the correctness of OWCP's decision.¹⁷

Counsel also argued that appellant's prior representative did not receive a letter from OWCP, as a suite number was not on the address and that the letter was returned for an insufficient address. The Board notes that it is unclear as to what correspondence the representative refers. The Board notes that OWCP's December 18, 2009 rescission decision was sent to appellant and counsel to their respective addresses of record. In the absence of evidence to the contrary, a letter properly addressed and mailed in the regular course of business is presumed to have arrived at the mailing address in due course. This is known as the mailbox rule.¹⁸ Although counsel contacted OWCP *via* telephone on January 8, 2010 and indicated that he did not receive a copy of the rescission decision, as noted, the decision was sent to the counsel's address of record. OWCP also indicated that it resent counsel another copy of the decision. The Board also notes that the record contains no indication that the December 18, 2009 rescission decision was returned as nondeliverable. Consequently, under the mailbox rule, it is presumed that appellant and counsel both received the decision. Appellant has not established clear evidence of error.

Following the July 12, 2010 decision, appellant also submitted an April 6, 2012 report from Dr. Shade. However, this report does not purport to offer a basis on which the December 18, 2009 rescission decision was clearly in error.¹⁹

The evidence and argument submitted by appellant is insufficient to raise a substantial question as to the correctness of the last merit decision. Consequently, appellant has not met her

¹⁷ If appellant disagrees with the manner in which another claim was adjudicated, she should pursue appeal rights provided with the other claim.

¹⁸ See *e.g.* *Kenneth E. Harris*, 54 ECAB 502 (2003).

¹⁹ See *F.R.*, Docket No. 09-575 (issued January 4, 2010) (evidence that is not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error).

burden to establish clear evidence of error on the part of OWCP such that it erred in denying merit review.

On appeal, counsel essentially repeated his arguments presented on reconsideration. He also argued that appellant was not given sufficient notice to respond to the rescission. However, appeal rights properly accompanied OWCP's December 18, 2009 decision. The Board finds that this assertion does not demonstrate clear evidence of error on the part of OWCP.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's claim for reconsideration of the merits as her request was untimely filed and failed to show clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the October 20, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 18, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board